

No. 77-1575

Supreme Court, U. S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner

v.

MIDWEST VIDEO CORPORATION, *et al.*,
Respondents

**STATEMENT OF AMERICAN BROADCASTING
COMPANIES, INC. IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

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**STATEMENT OF AMERICAN BROADCASTING
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American Broadcasting Companies, Inc., ("ABC"), by its attorneys, respectfully asks this Court to issue a writ of certiorari, as requested by the Federal Communications Commission, to review the decision of the Court of Appeals for the Eighth Circuit in this case.

**PETITION OF THE
FEDERAL COMMUNICATIONS COMMISSION**

The petition of the Federal Communications Commission ("Commission") for writ of certiorari sets forth the questions presented, the relevant facts, the jurisdiction of this Court and the constitutional and statutory provisions

involved. ABC adopts these showings made by the Commission in its petition.

REASONS FOR GRANTING THE WRIT

A. Conflict Among Circuit Decisions On The Commission's Jurisdiction To Regulate The CATV Industry.

The opinion of the Eighth Circuit holds that regulation of cable television systems to require public access and related public service is beyond the Commission's jurisdiction. As shown by the Commission in its petition, that holding is inconsistent with the opinion of this Court in *Midwest*¹ and is irreconcilable with a 1975 opinion of the Ninth Circuit which considered and affirmed the validity of the Commission's earlier cable access rules.²

In addition, the District of Columbia Circuit has recently held that the Commission does not have jurisdiction to regulate pay cable services³ while the Second Circuit has also recently held that the Commission has jurisdiction to preempt state and local regulation of pay cable services.⁴

These various opinions present serious confusion and conflict as to the authority of the Federal Communications Commission, as well as of state and local bodies, to regulate the very important and rapidly expanding cable television industry.⁵

¹ *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972).

² *American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975).

³ *Home Box Office v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), cert. denied, 98 S. Ct. 111 (1977).

⁴ *Brookhaven Cable TV, Inc. v. Kelly*, Nos. 77-6165, 77-6157 (2d Cir. March 29, 1978).

⁵ See *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

B. Conflict Among Circuit Decisions On Constitutional Issues.

The Eighth Circuit's opinion herein went on to express the view that invalidating the access rules was necessary for constitutional, as well as jurisdictional, reasons. These constitutional views, principally based on this Court's opinion in *Miami Herald*⁶ are in major conflict with opinions of this Court in *Red Lion* and *CBS*⁷ as the Commission shows in its petition.

C. The Importance of The Issues Presented.

Ten years ago this Court, in affirming the Commission's assertion of jurisdiction to regulate cable television, observed that the "significance of its [the Commission's] efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population. The Commission has reasonably found that the successful performance of these duties demands prompt and efficacious regulation of community antenna television systems."⁸ At that time there were an estimated 2.8 million cable television homes in the United States and pay cable services did not exist. In the intervening 10 years, cable television subscribers have increased to an estimated 13 million and pay cable subscribers have increased from none in 1972 to an estimated 1.6 million in 1978.⁹

The opinion of the Eighth Circuit deprives the Commission of authority to implement important aspects of its

⁶ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

⁷ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *CBS v. Democratic National Committee*, 412 U.S. 94 (1973).

⁸ *United States v. Southwestern Cable Co.*, *supra* at 177.

⁹ 47 *Television Factbook*, Services Volume 76-a (1978 ed.); Paul Kagan Associates, Inc., 201 *Cablecast* 3 (March 22, 1978).

cable regulatory program and raises serious questions as to the Commission's overall regulatory authority in the important cable television industry. The confusing and conflicting series of decisions below have placed in doubt the capacity of the Commission to undertake "prompt and efficacious regulation of community antenna television systems" which this Court has found necessary for the protection of the public.

We respectfully suggest that this Court should accept review.

Respectfully submitted,

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